

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAH L. STANDISH,)	
)	
Plaintiff,)	Civ. No. 06-6240-TC
)	
vs.)	
)	
)	FINDINGS AND RECOMMENDATION
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

Coffin, Magistrate Judge:

Plaintiff, Deborah L. Standish, brings this action for judicial review of a final decision of the Commissioner of Social Security (Commissioner) pursuant to 42 U.S.C. § 405(g). The Commissioner denied her claim for Supplemental Security Income (SSI) benefits. For the reasons set forth below, the court recommends that the decision of the Commissioner be affirmed.

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PROCEDURAL BACKGROUND

Standish applied for SSI benefits on January 31, 2003, alleging disability since May 25, 2000 due to degenerative disc disease.¹ (Tr. 59-61, 68, 113.) Her application was denied initially and upon reconsideration. (26-30, 35-37.) A hearing was held before Administrative Law Judge (ALJ) Catherine R. Lazuran on March 29, 2005. (Tr. 336-367.) In a decision dated June 22, 2005, the ALJ found that Standish was not entitled to benefits. (Tr. 11-23.) The Appeals Council denied Standish's request for review on September 12, 2006, making the ALJ's decision the Commissioner's final decision. (Tr. 5-7.) Standish filed a timely action seeking judicial review in this court.

STANDARDS

A claimant is disabled if he or she is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The initial burden of proof rests upon the claimant to establish his or her disability. Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied, 517 U.S. 1122 (1996). The Commissioner bears the burden of developing the record. DeLorme v. Sullivan, 924 F.2d 841, 849 (9th Cir. 1991).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are

¹ At her hearing, Standish testified that she was unable to work because she "can't stand or walk long enough and [she] gets very, very agitated, anxiety like attacks, very nervous, very easily." (Tr. 435.)

1 supported by substantial evidence in the record as a whole. 42
2 U.S.C. § 405(g); see also Andrews v. Shalala, 53 F.3d 1035, 1039
3 (9th Cir. 1995). "Substantial evidence means more than a mere
4 scintilla but less than a preponderance; it is such relevant
5 evidence as a reasonable mind might accept as adequate to support
6 a conclusion." Andrews, 53 F.3d at 1039. The court must weigh
7 all of the evidence, whether it supports or detracts from the
8 Commissioner's decision. Martinez v. Heckler, 807 F.2d 771, 772
9 (9th Cir. 1986). The Commissioner's decision must be upheld,
10 however, if "the evidence is susceptible to more than one
11 rational interpretation." Andrews, 53 F.3d at 1039-40.

12 **DISABILITY ANALYSIS**

13 The ALJ engages in a five-step sequential inquiry to
14 determine whether a claimant is disabled within the meaning of
15 the Act. 20 C.F.R. §§ 404.1520, 416.920. At steps one through
16 four, the burden of proof is on the claimant. Tackett v. Apfel,
17 180 F.3d 1094, 1098-1099 (9th Cir. 1999). At step five, the
18 burden shifts to the Commissioner to show that the claimant can
19 perform jobs that exist in significant numbers in the national
20 economy. *Id.* Below is a summary of the five steps, which also
21 are described in Tackett:

22 Step One. The Commissioner determines whether claimant is
23 engaged in substantial gainful activity. If so, claimant is not
24 disabled. If claimant is not engaged in substantial gainful
25 activity, the Commissioner proceeds to evaluate claimant's case
26 under step two. 20 C.F.R. §§ 404.1520(b), 416.920(b). In this
27 case, the ALJ found that Standish was not engaged in substantial
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1 gainful activity at any time relevant to the decision. This is
2 not disputed.

3 Step Two. The Commissioner determines whether claimant has
4 one or more severe impairments. If not, claimant is not
5 disabled. If claimant has a severe impairment, the Commissioner
6 proceeds to evaluate claimant's case under step three. 20 C.F.R.
7 §§ 404.1520(c), 416.920(c). At step two, the ALJ found that
8 Standish's severe impairments were: alcoholism and drug
9 addiction; degenerative disc disease of the lumbar spine;
10 cervical spinal stenosis; hepatitis C; history of shoulder
11 injury; and mild left ulnar neuropathy. (Tr. 21.) This finding
12 is disputed; Standish argues that the ALJ failed to consider or
13 evaluate all of her severe impairments.

14 Step Three. Disability cannot be based solely on a severe
15 impairment; therefore, the Commissioner next determines whether
16 claimant's impairment "meets or equals" one of the impairments
17 listed in the Social Security Administration ("SSA") regulations,
18 20 C.F.R. Part 404, Subpart P, Appendix 1. If so, claimant is
19 disabled. If claimant's impairment does not meet or equal one
20 listed in the regulations, the Commissioner's evaluation of
21 claimant's case proceeds under step four. 20 C.F.R. §§
22 404.1520(d), 416.920(d). At step three, the ALJ found that
23 Standish's severe impairments did not meet or medically equal one
24 of the listed impairments. (Tr. 21.) Standish does not dispute
25 this finding. At this step, the ALJ made the following residual
26 functional capacity (RFC) finding: Stanish could lift 10 pounds
27 at a time and ten pounds frequently and occasionally; stand and
28 walk 20 minutes at a time and 2 hours out of an 8 hour day; sit

4 Findings and Recommendation

1 30 minutes at a time and 6 hours of an 8 hour day, requiring an
2 option to sit or stand; occasionally push or pull, kneel, stoop,
3 crouch, and crawl, precluding ladder rope or scaffolding
4 climbing, as well as overhead reaching with the left non-
5 dominant extremity or reaching with the right upper extremity;
6 and mild difficulty using the left upper extremity for fine
7 manipulation such as keyboarding; and mild difficulty with social
8 functioning and concentration, persistence and pace. (Tr. 19,
9 22.) Standish implicitly disputes this finding.

10 Step Four. The Commissioner determines whether claimant is
11 able to perform work he or she has done in the past. If so,
12 claimant is not disabled. If claimant demonstrates he or she
13 cannot do work performed in the past, the Commissioner's
14 evaluation of claimant's case proceeds under step five. 20
15 C.F.R. §§ 404.1520(e), 416.920(e). In this case, the ALJ
16 determined that Standish was not able to return to her past work.
17 (Tr. 22.) This finding is not disputed.

18 Step Five. The Commissioner determines whether claimant is
19 able to do any other work. If not, claimant is disabled. If the
20 Commissioner finds claimant is able to do other work, the
21 Commissioner must show a significant number of jobs exist in the
22 national economy that claimant can do. The Commissioner may
23 satisfy this burden through the testimony of a vocational expert
24 ("VE") or by reference to the Medical-Vocational Guidelines, 20
25 C.F.R. Part 404, Subpart P, Appendix 2. If the Commissioner
26 demonstrates a significant number of jobs exist in the national
27 economy that claimant can do, claimant is not disabled. If the
28 Commissioner does not meet this burden, claimant is disabled. 20

1 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1). Here, the ALJ concluded
2 that Standish was not under a disability as defined in the Social
3 Security Act. (Tr. 22.) This finding is disputed.

4 **FACTUAL BACKGROUND**

5 Standish was 46 at the time of her administrative hearing.
6 (Tr. 426.) She has a high school education and no vocational
7 training. (Tr. 428.) She was last employed in September 2000 as
8 a live-in care giver. (Tr. 428.) Standish had work experience as
9 a home attendant/care-giver, window assembler, and cleaner. (Tr.
10 478.)

11 The medical records in this case accurately set out
12 Standish's medical history as it relates to her claim for SSI.
13 The court has carefully reviewed the medical records, and the
14 parties are familiar with the record. Accordingly, the details
15 of the medical records will be set forth below only as they are
16 relevant to the issues before the court.

17 **DISCUSSION**

18 Standish contends that the ALJ erred by: (1) failing to
19 consider or evaluate all of her severe impairments at step two;
20 (2) failing to properly assess her functional limitations for
21 each of her severe limitations; (3) improperly relying on
22 vocational expert (VE) testimony establishing her ability to
23 perform other work in the national economy and; (4) failing to
24 properly consider lay witness testimony

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1 I. Failure to Properly Evaluate Impairments At Step Two

2 Standish contends that the ALJ erred by failing to consider
3 or evaluate her depression, anxiety and/or fatigue in the step-
4 two analysis.

5 The second step of the five-step evaluation process, the
6 "severity step," weeds out claimants with minor problems, making
7 them ineligible for benefits. Bowen v. Yuckert, 482 U.S. 137,
8 153-54 (1987). To satisfy step-two's requirement of a severe
9 impairment, the claimant must prove the physical or mental
10 impairment by providing evidence consisting of signs, symptoms,
11 and laboratory findings; the claimant's own statement of symptoms
12 alone will not suffice. 20 C.F.R. §§ 404.1508, 416.908. An
13 impairment or combination of impairments can be found "not
14 severe" only if the evidence establishes a slight abnormality
15 that has "no more than a minimal effect of an individual's
16 ability to work." Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir.
17 1988).

18 A comprehensive mental health assessment from May 2001 noted
19 Standish's alcohol and drug abuse, diagnosed her with schizo-
20 affective disorder and drug and alcohol addictions. (Tr. 323.)
21 Treatment notes indicated that Standish denied depression. (Tr.
22 322.) Standish was given a prescription for anxiety medication
23 after the May 2001 visit. (Tr. 323.) Emergency room records
24 from September 2004 indicate that Standish "[had] once again been
25 using methamphetamine and [had] become very anxious." (Tr. 395.)
26 The use of drugs made Standish increasingly agitated. (Tr. 396.)
27 Standish's treating physician, Roy E. Hall, M.D. noted in October
28 19, 2004 that her "history of present illness" was extreme

1 anxiety, drug and alcohol abuse." (Tr. 331.) Treatment notes
2 from January 2005 indicate that Standish saw Dr. Hall and her
3 chief complaint was "follow-up for anxiety, which is chronic in
4 nature." (Tr. 328.) A February 10, 2005 treatment note
5 indicates that Standish saw Dr. Hall for complaints concerning
6 "her anxiety, depression associated with alcoholism." (Tr. 327.)

7 At the onset, the court notes that the Commissioner
8 correctly points out that fatigue is a symptom, not an
9 impairment. SSR 96-7p; 1996 WL 374186. Accordingly, the court
10 considers whether the ALJ correctly considered or evaluated
11 Standish's depression and anxiety.

12 Under the circumstances of this case, the court finds that
13 the ALJ did not commit reversible error by failing to consider or
14 evaluate Standish's complaints of depression and anxiety. In her
15 decision, the ALJ acknowledged that there were references to
16 anxiety and depression in Standish's treatment records. (Tr. 16-
17 17.) The ALJ considered these references, but noted that most of
18 the records indicated that Standish had a drug abuse problem,
19 which caused anxiety; however, Standish was never diagnosed with
20 an anxiety disorder. (Tr. 17.) The ALJ noted Standish had been
21 diagnosed with schizo-affective disorder by a nurse practitioner,
22 but that no psychologist or psychiatrist had diagnosed this
23 disorder. (Tr. 17.) Most references to anxiety in the medical
24 record are subjective reports of anxiety by Standish, not
25 diagnoses of anxiety by medical personnel; physician's notes
26 concerning anxiety are mostly related to drug use. In short, the

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1 ALJ's finding that Standish did not have a medically determinable
2 severe anxiety disorder is supported by substantial evidence in
3 the record and should be affirmed.

4 II. Failure To Consider Functional Limitations

5 Standish contends that the ALJ erred by failing to consider
6 functional limitations not considered severe—her depression,
7 anxiety and/or fatigue, in her RFC determination. Standish also
8 argues that the ALJ's decision is internally inconsistent because
9 she failed to provide functional limitations for each of
10 Standish's severe impairments.

11 In her RFC determination, the ALJ noted that Standish
12 testified that she had problems with anxiety, sleeps 12 hours,
13 lies down all day long, is tired all of the time due to hepatitis
14 C, and stays in bed 25 days a month due to fatigue. (Tr. 17-18.)
15 The ALJ found that Standish's testimony concerning her fatigue
16 and staying in bed for extended periods of time was not
17 consistent with the daily activities to which she testified.²
18 (Tr. 18.) However, the ALJ still considered plaintiff's fatigue
19 when she determined her RFC, stating: "in light of the claimant's
20 complaints of pain and fatigue, the undersigned finds she can
21 stand and walk 2 hours out of an 8 hour day...." (Tr. 19.) The
22 court finds that Standish's contention that the ALJ erred by
23 failing to consider her depression, anxiety and/or fatigue is
24 without merit.

25 Standish's contention that the ALJ failed to provide
26 functional limitations "related to her alcohol use, drug use, or
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28 ²Standish has not challenged the ALJ's credibility finding.

1 Hepatitis C" is similarly without merit. The ALJ specifically
2 found that Standish's "neuropathy, degenerative disc disease, and
3 hepatitis C result in lifting, standing, walking and sitting
4 limitations described" in her RFC determination. (Tr. 19.) The
5 ALJ considered that Standish's alcohol and drug abuse resulted
6 in "some mental limitations." (Tr. 19.) The ALJ noted "mild
7 difficulties in social functioning and mild difficulties in
8 maintaining concentration, persistence or pace." (Tr. 20.) The
9 court finds that the RFC determination contains all of Standish's
10 functional limitations and is supported by substantial evidence.
11 Thus, the court recommends that the RFC determination be
12 affirmed.

13 III. Improper Reliance On Vocational Expert Testimony

14 Standish contends that the VE deviated from the Dictionary
15 of Occupational Titles's (DOT)³ definition of job classifications.
16 She asserts that this prejudiced her and that it was reversible
17 error for the ALJ to rely on the expert's opinion in determining
18 that Standish can perform jobs in the national economy.

19 The ALJ directed the VE to assume that Standish was limited
20 to sedentary work and had the following exertional limitations:
21 lift 20 pounds occasionally and 10 pounds frequently, can stand
22 and walk about six of eight hours and sit about six of eight
23 hours, can occasionally climb ladders, ropes or scaffolds, can
24 occasionally stoop, kneel, crouch, and crawl, and should not do
25

26 ³ The DOT is the Commissioner's primary source of reliable
27 job information. Terry v. Sullivan, 903 F.2d 1273,1276
28 (9th Cir. 1990). One purpose of the DOT is to classify
identified job titles by their exertional and skill
requirements. Id.

1 overhead reaching with the left upper extremity or constant
2 reaching with the right upper extremity, and needs an option to
3 sit 30 minutes at a time and stand 20 minutes at a time. (Tr.
4 479-481.) The VE testified that Standish could not perform her
5 former relevant work, but could work as a surveillance system
6 monitor or telemarketer. (Tr. 481.)

7 DOT's classifications do not classify jobs with a sit or
8 stand option. However, DOT raises a presumption with regard to
9 job classification that is rebuttable. Johnson v. Shalala, 60
10 F.3d 1428, 1434 (1995). "[A]n ALJ may rely on expert testimony
11 which contradicts the DOT, but only insofar as the record
12 contains persuasive evidence to support the deviation." Id.
13 Here, the VE testified that both surveillance system monitors and
14 telemarketer have sit/stand options. Because the demands of
15 these jobs do not exceed the abilities the ALJ found the claimant
16 to possess, the vocational expert explained that Standish could
17 perform specific types of sedentary work; thus rebutting any
18 presumption that she was precluded from performing jobs
19 classified as sedentary by the DOT due to a sit/stand limitation.
20 The court finds that there is persuasive evidence in the record
21 of jobs in the national economy which will allow Standish to
22 perform sedentary work with a sit/stand option. Accordingly, the
23 court finds that the ALJ did not err in relying on the VE's
24 testimony.

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1 IV. Failure To Consider Lay Testimony

2 Standish's final contention is that the ALJ committed
3 reversible error when she did not consider the testimony of lay
4 witness Delores Blankenbaker.

5 An ALJ is required to consider lay witness testimony in
6 certain types of cases. Smolen v. Chater, 80 F.3d 1273, 1288
7 (9th Cir. 1996). When a claimant alleges pain or other
8 symptoms that are not supported by the medical evidence in the
9 file, the adjudicator shall obtain detailed descriptions of
10 daily activities by directing specific inquiries about pain and
11 its effect to third parties who would be likely to have such
12 knowledge. Id. In Smolen, plaintiff's alleged disability was
13 based on fatigue and pain. Id. Her medical records were sparse
14 and did not provide adequate documentation of her symptoms.
15 See id. Her friends and family members testified on her behalf
16 at her hearing, and the ALJ rejected their testimony. Id.

17 However, the Ninth Circuit has noted that an ALJ
18 "need not discuss all evidence presented. Rather, [she] must
19 explain why 'significant probative evidence has been
20 rejected.'" Vincent on Behalf of Vincent v. Hecker, 739 F.2d
21 1393, 1394-1395 (9th Cir. 1984) (emphasis in original) (internal
22 citations omitted). In Vincent, the Ninth Circuit held that
23 failure to discuss lay testimony did not require reversal. Id.
24 at 1395.

1 Here, Ms. Blankenbaker, who is Standish's mother,
2 completed a "Third Party Activities of Daily Living and
3 Socialization" form in March 2003. (Tr. 156-67.) Ms.
4 Blakenbaker's responses indicated that Standish had normal
5 social interactions, had trouble walking, had problems sleeping
6 and was able to cook simple meals for herself. (Tr. 156-67.)
7 Ms. Blakenbaker explained that Standish was not employed
8 because she "cannot work. Her back will not allow [her] to move
9 much." (Tr. 166.)
10

11 Unlike the symptoms in Smolen, Standish's symptoms and
12 medical impairments were very well documented in the records.
13 More importantly, nothing in Ms. Blankenbaker's statement was
14 contrary to the ALJ's finding. The statement mentioned that
15 Standish was limited by her back pain and the ALJ's RFC finding
16 specifically accounted for Standish's back pain. The statement
17 made no mention of Standish's problems due to anxiety or
18 depression.
19

20 While the ALJ perhaps should have discussed Ms.
21 Blankenbaker's statement, the court finds that this omission
22 does not require remand. Standish's symptoms were adequately
23 developed in the medical records and Blackenbaker's statement
24 was not probative of the issues that Standish alleges the ALJ
25 erred in failing to consider-depression, anxiety and/or
26 fatigue.
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1 **CONCLUSION**

2 The court finds that the ALJ's decision is supported by
3 substantial evidence in the record and that there has been no
4 reversible error.

5 IT IS RECOMMENDED that the decision of the ALJ be
6 affirmed.
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8 These findings and recommendations are submitted to the
9 United States District Judge assigned to this case, pursuant to
10 the provisions of 28 U.S.C. § 636(b)(1). Within ten days after
11 being served with these findings and recommendations, any party
12 may file written objections with the court and serve a copy on
13 all parties. Such a document should be captioned "Objections
14 to Magistrate Judge's Findings and Recommendations." Any reply
15 to the objections shall be served and filed within 10 days
16 after service of the objections. The parties are advised that
17 the failure to file objections within the specified time may
18 waive the right to appeal the District Court's order. Martinez
19 v. Ylst, 951 F.2d 1153 (9th Cir. 1991).
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23 Dated this 12 day of July, 2007.

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27 THOMAS M. COFFIN
28 United States Magistrate Judge